

**Public Prosecutor v Muhammad Faiz bin Fazil Mahmud &
Anor**

COURT OF APPEAL (PUTRAJAYA) — APPEAL NO B-05(H)-348–12 OF
2015
ZAKARIA SAM, ABANG ISKANDAR AND ZAMANI A RAHIM JJCA
1 JULY 2016

Criminal Law — Sentence — Appeal against sentence — Respondent charged for offence of in possession of dangerous drug — Respondent pleaded guilty — Respondent convicted and sentenced to seven years imprisonment — Whether sentence imposed by trial judge inadequate — Dangerous Drugs Act 1952 ss 6 & 39A(2)

The respondent was initially charged for trafficking in dangerous drug, however, the appellant had offered an alternative charge of possession under s 6 of the Dangerous Drugs Act 1952 ('the DDA') punishable under s 39A(2) of the same. The respondent pleaded guilty on the alternative charge and was sentenced to seven years imprisonment from the date of arrest; and ten strokes of whipping. The present appeal by the appellant was in respect of the inadequacy of the imprisonment sentence imposed by the learned trial judge against the respondent. The appellant contended that the sentence was manifestly inadequate taking into consideration the amount of cannabis involved in this case which was 871g. The appellant also contended that such sentence was not in line with the current trend of sentencing involving the same kind of offence imposed by the courts. The respondent on the other hand contended that there were no aggravating factors which would warrant an appellate intervention to enhance the imprisonment term that had been imposed by the learned trial judge.

Held, allowing the appeal:

- (1) Based on the sentencing trend, the range of sentencing was between 10–13 years imprisonment. The amount of cannabis in this case was 871g which was 17 times over the threshold amount of 50g. That definitely would reflect the seriousness of the offence. Plea of guilty by the respondent did not entitle him to an automatic reduction of sentence as sentencing is entirely at the discretion of the court, unless the law under scrutiny stipulated otherwise. In consideration of public interest, the sentencing trend for similar offence and in view of the large amount of

A cannabis, the sentence passed by the trial judge was manifestly inadequate. Thus the court replaced the sentence of seven years imprisonment to ten years imprisonment to be effective from the date of arrest (see paras 16–17).

B **[Bahasa Malaysia summary]**

Responden pada mulanya dituduh mengedar dadah berbahaya, walau bagaimanapun, perayu telah menawarkan tuduhan alternatif milikan di bawah s 6 Akta Dadah Berbahaya 1952 (‘ADB’) yang boleh dihukum di bawah s 39A(2) Akta yang sama. Responden mengaku bersalah atas tuduhan alternatif dan dihukum kepada tujuh tahun penjara dari tarikh tangkapan; dan sepuluh sebatan rotan. Rayuan ini oleh perayu adalah berkaitan ketidakcukupan hukuman penjara yang dikenakan oleh hakim perbicaraan yang bijaksana terhadap responden. Perayu berhujah bahawa hukuman adalah jelas tidak mencukupi mengambil kira jumlah kanabis yang terlibat dalam kes adalah 871g. Perayu juga berhujah bahawa hukuman sedemikian tidak sejajar dengan perkembangan semasa hukuman yang melibatkan hukuman yang sama yang dikenakan oleh mahkamah-mahkamah. Responden sebaliknya berhujah bahawa tidak terdapat faktor yang lebih teruk untuk mewajarkan campurtangan mahkamah rayuan bagi menambah tempoh hukuman penjara yang dikenakan oleh hakim perbicaraan yang bijaksana.

Diputuskan, membenarkan rayuan:

(1) Berdasarkan perkembangan hukuman, lingkungan hukuman adalah di antara 10–13 tahun penjara. Jumlah kanabis dalam kes ini adalah 871g yang mana adalah 17 kali lebih bendul jumlah sebanyak 50g. Ini semestinya membayangkan keseriusan kesalahan. Pengakuan bersalah oleh responden tidak memberikannya hak kepada pengurangan hukuman automatik kerana hukuman adalah keseluruhannya atas budi bicara mahkamah, kecuali undang-undang di bawah penelitian menyatakan sebaliknya. Mengambil kira kepentingan awam, perkembangan hukuman bagi kesalahan yang sama dan mengambil kira jumlah besar kanabis, hukuman yang dijatuhkan oleh hakim perbicaraan jelas tidak mencukupi. Oleh itu, mahkamah menggantikan hukuman tujuh tahun penjara kepada sepuluh tahun penjara berkuat kuasa dari tarikh tangkapan (lihat perenggan 16–17).]

Notes

For cases on appeal against sentence, see 4(3) *Mallal’s Digest* (5th Ed, 2015) paras 3910–3951.

Cases referred to

Bachik bin Abdul Rahman v PP [2004] 2 MLJ 534; [2004] 2 CLJ 572, CA (refd)

Bhandulananda Jayatilake v PP [1982] 1 MLJ 83, FC (refd)

PP v Mohd Saifuddin bin Mohd Yusop (Criminal Appeal No J-05(s)-14-01 of 2014) (unreported), CA (refd)

PP v Marzuki bin Kahar (Criminal Appeal No C-05(S)-67-02 of 2013) (unreported), CA (refd)

PP v Shahrulnizam bin Borhan (Criminal Appeal No J-05(S)-6-01 of 2014) (unreported), CA (refd)

PP v Mohd Faiz bin Salleh (Criminal Appeal No M-05(S)-171-06 of 2015) (unreported), CA (refd)

R v Ball (1951) 35 Cr App Rep 164, CA (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 6, 39A(2), 39B(1)(a)

Penal Code s 34

Appeal from: Criminal Trial No 45A-208-12 of 2013 (High Court, Shah Alam)

Ahmad Sazilee bin Abdul Khairi (Public Prosecutor, Attorney General's Chambers) for the appellant.

Md Ridzuan bin Othman (Zahir Razak & Co) for the respondent.

Abang Iskandar JCA (delivering judgment of the court):**THE CHARGE:**

Bahawa kamu bersama-sama pada 19.5.2013, jam lebih kurang 12.01 tengah malam, di hadapan McDonalds, Jalan SS 21/39, Up Town 5, Damansara Utama, di dalam Daerah Petaling Jaya, di dalam Negeri Selangor, telah mengedar dadah berbahaya iaitu 871 gram Cannabis, dan dengan itu kamu telah melakukan suatu kesalahan di bawah s 39B (1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah s 39B (2) Akta yang sama dibaca bersama s 34 Kanun Keseksaan.

BRIEF FACTS OF THE CASE

[1] On 5 September 2013, acting upon the information on drug trafficking activity, ASP Mohd Sahar bin Mohd Yunus ('the complainant') and his team went to Jalan SS 21/39 Up Town 5, Damansara Utama, Petaling Jaya.

[2] After making observation, the complainant saw a man who was later identified as Muhammad Faiz bin Fazil Mahmud ('the second accused') was

A sitting with a woman who was later identified as Raznina Alysha bt Radzlan ('the first accused') at a table outside Mc Donalds' restaurant.

[3] The complainant and his team then approached the first and second accused's table and introduced themselves as police officers to both of them. A
B body search was conducted on the second accused but nothing incriminating was found. The police then found and seized a green handbag written Fuji Xerox from the table. On further inspection of the bag, the police found a slab, wrapped in transparent plastic and aluminium foil, suspected to be drugs with a gross weight of 912g.

C [4] Puan Norhaya Jaafar, the government chemist, after due analysis had confirmed that the slab was cannabis weighing 871g. Cannabis is a dangerous drug as defined in s 2 of the Dangerous Drugs Act 1952 ('the DDA').

D [5] Both accused were jointly charged for trafficking in dangerous drug under s 39B(1)(a) of the DDA read together with s 34 of the Penal Code. The prosecution had subsequently offered an alternative charge of possession under s 6, punishable under s 39A(2) of the DDA.

E [6] The first accused pleaded guilty on the alternative charge on 13 April 2015. The second accused had followed suit on 27 November 2015. Both accused were sentenced to seven years imprisonment from the date of arrest. The second accused was also ordered to suffer ten strokes of the whipping.

F [7] This has been, the appeal by the public prosecutor in respect of the inadequacy of sentence imposed by the learned High Court judge against the second accused only. The appeal by the public prosecutor against the first accused was withdrawn on 7 April 2016 which was filed separately vide appeal
G case No B-05(S)-152-06 of 2015.

THE APPEAL

[8] For the purpose of this grounds of judgment, the second accused is
H referred to as the respondent.

[9] We heard the appeal on 19 May 2016. After perusing through the record of appeal and submissions by both parties, we had unanimously agreed to increase the term of imprisonment from seven years that was imposed by the
I learned High Court judge to ten years imprisonment. However, we had maintained the ten strokes of whipping as imposed by the learned High Court judge. This is now our reasoning for having so decided.

[10] Basically, the appeal by the public prosecutor was against the order on the imprisonment sentence. Before us, learned deputy public prosecutor ('DPP') submitted that the sentence was manifestly inadequate, taking into consideration the amount of cannabis involved in this case, that is 871g. Such sentence of imprisonment was also not in line with the current trend of sentencing involving the same kind of offence imposed by the courts. The DPP brought our attention to cases like *Public Prosecutor v Mohd Faiz bin Salleh* Criminal Appeal No M-05(S)-171-06 of 2015, *Public Prosecutor v Shahrulnizam bin Borhan* Criminal Appeal No J-05(S)-6-01 of 2014, *Public Prosecutor v Mohd Saifuddin bin Mohd Yusop* Criminal Appeal No J-05(s)-14-01 of 2014 and *Public Prosecutor v Marzuki bin Kahar* Criminal Appeal No C-05(S)-67-02 of 2013 where the this court had increased the sentences of imprisonment imposed by the High Court judges against all the accused persons in those cases ranging from ten to eleven years involving cannabis of similar amount. The learned DPP also submitted that although the plea of guilty and being a first offender are relevant factors to be considered, nevertheless such factors ought not to automatically entitle the respondent to a lenient sentence of imprisonment.

[11] On the other hand, learned counsel for the respondent had submitted that there were no aggravating factors which would warrant an appellate intervention to enhance the imprisonment term that had been imposed by the learned High Court judge. The sentence of seven years imprisonment and ten strokes of whipping was still within the ambit of the punishment as provided by s 39A(2) of the DDA.

[12] Further, in supporting his submissions that the imprisonment was sufficient and not manifestly inadequate, the learned defence counsel contended that:

- (a) the sentence imposed by the learned High Court judge had met the public interest requirement. The respondent had already served two years and six months imprisonment when he pleaded guilty on 27 November 2015;
- (b) his plea of guilty was a clear sign that he was remorseful; and
- (c) the facts of the case had shown that the respondent was only twenty years, four months and eleven days old when he was arrested. Apart from that, he was a first offender, unmarried, and was still studying at Segi College in Petaling Jaya. The imprisonment term that was imposed against the respondent, being a youthful offender, was sufficient to deter him from committing any offence in future.

A OUR DECISION

[13] After perusing the record of appeal and having considered the submissions by both parties we had unanimously agreed that the imprisonment term of seven years as was meted out by the learned High Court judge was manifestly inadequate.

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[14] Uppermost on our mind when dealing with this kind of an appeal is the factor of public interest. As is trite, criminal law is publicly enforced and the reason underlying that policy has been that a crime must be dealt with in such a way that would-be offenders would be deterred from committing similar offence. Granted that rehabilitation may also be a relevant factor to be considered in deserving cases, the court invariably will lean in favour of meting out a deterrent sentence taking into account the kind of offence that was committed by the offender and the rampancy of such an offence. Having considered those factors, the court will then see what the trend on sentencing for similar kind of offence that was being considered on appeal would be like. Having said that, the court is well aware that there is no such thing as a 'one size fits all' kind of sentence for all offences. The law provides for a range of sentence within which the court is empowered to mete out an appropriate sentences depending on the relevant factors as the circumstances of the case may present (see generally, the case of *R v Ball* (1951) 35 Cr App Rep 164 the oft-cited judgment of Hilbery J).

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[15] In this case, the relevant law on punishment for the kind of offence committed by the respondent, as contained under s 39A(2) of the DDA, has provided for a maximum sentence of life imprisonment (thirty years) and a minimum imprisonment of five years, on conviction and also a minimum of ten strokes of the whipping. In this case, the learned High Court judge had imposed an imprisonment term of seven years. Having scrutinised at the facts of this case and the circumstances surrounding the commission of the offence and the fact that the respondent had pleaded guilty and was a youthful offender, we were of the considered view that the learned High Court judge had erred in exercising his discretion in passing such a sentence of imprisonment on the respondent. It was quite apparent to us that had His Lordship taken into account the public interest as the paramount consideration, he would not have meted out such a sentence as he did. There was no ostensible reason justifying an overly lenient sentence that was imposed on the respondent. In the case of *Bhandulananda Jayatilake v Public Prosecutor* [1982] 1 MLJ 83, the apex court had occasion to say:

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Held: (2) the learned trial judge was justified in outweighing the plea of mitigation

in favour of the public interest with a desire to uphold the dignity and authority of the law in this country.

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[16] Considering the public interest and the trend on sentencing for similar offence, in view of the large amount of cannabis, we agreed with the learned DPP that the sentence being appealed against was manifestly inadequate in the circumstances. We had seen how an offence of this nature ought to be dealt with in previously decided cases and there was no reason for us to depart from the prevailing trend that could be discerned from the sentencing pattern followed by this court in similar cases. The range of sentencing that we noticed was between 10–13 years imprisonment. That gave us an idea of what the appropriate sentence ought to be, taking into account the peculiarities of this case. The amount of cannabis in this case was 871g. That amount had represented more than ten times the threshold amount of 50g that would trigger the operation of s 6 of the DDA that is punishable under s 39A(2) of the same Act. To be exact, it was 17 times over the threshold amount of 50g. That definitely would reflect the seriousness of the offence. The fact that the respondent had pleaded guilty to the charge does not mean that he was entitled to an automatic reduction in the sentence to be imposed. Sentencing is entirely at the discretion of the court, unless the law under scrutiny stipulated otherwise. In the case of *Bachik bin Abdul Rahman v Public Prosecutor* [2004] 2 MLJ 534; [2004] 2 CLJ 572 (*'Bachik bin Abdul Rahman case'*) it was held that '... there can therefore be no automatic rule that a guilty plea on its own entitles an accused to a lesser punishment ...'. Even if an accused person is entitled to a reduction, such reduction must reflect the peculiar circumstances of the particular case. So, any reduction of sentence must be fact-sensitive. It must be amply justified by the extenuating circumstances of the case before the sentencing court. In short, it should not be awarded arbitrarily, rather it should be a product of a mature exercise of judicial discretion. As was held by this court in the *Bachik bin Abdul Rahman* case giving a reduction is not a strict rule in that 'in exercise of its discretion, it may refuse to grant any discount'.

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[17] Having so considered, we had come to our unanimous decision that the sentence of imprisonment of seven years ought to be set aside and in its place, we had imposed an imprisonment term of ten years to be effective from the date of his arrest. We had also decided not to disturb the sentence of ten strokes of the whipping that was imposed by the learned High Court judge. We had therefore allowed the appeal by the public prosecutor.

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[18] Order accordingly

A *Appeal allowed.*

Reported by Dzulqarnain Ab Fatar

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